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NORTHERN DISTRICT OF CALIFORNIA

Kristin Henry (CA Bar No. 220908)
Sierra Club
85 Second Street
San Francisco, CA 94104
(415) 977-5716
(415) 977-5793 FAX
kristin.henry@sierraclub.org

David Bookbinder (D.C. Bar No. 455525) Pro Hac Vice Application Pending
Sierra Club
408 C Street, NE
Washington, DC 20002-5818
(202) 548-4598
(202) 547-6009 FAX
david.bookbinder@sierraclub.org

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Attorneys for Plaintiff Sierra Club

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

CRB

SIERRA CLUB, a non-profit organization,

Plaintiff,

v.

DONALD RUMSFELD, in his official
capacity as Secretary of the Department of
Defense; and UNITED STATES
DEPARTMENT OF DEFENSE,

Defendants.

Case No.:

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

(Administrative Procedure Act Case)

INTRODUCTION

1. Plaintiff Sierra Club brings this suit against Donald Rumsfeld, Secretary of the United States Department of Defense, and the United States Department of Defense (“DOD”) in order to compel them to comply with the National Defense Authorization Act for Fiscal Year 2006 (the “Authorization Act”). In the Authorization Act, Congress mandated that Defendants complete a study on the effect of windmill farms on military readiness and the operation of military radar installations (the “Wind Report”) by May 8, 2006. Although this deadline has passed, Defendants have yet to issue the Wind Report; indeed, it appears that DOD is still trying to define the scope of the project. As a result of Secretary Rumsfeld’s and DOD’s inability to follow Congress’ orders, wind energy projects across the nation have been prevented from moving forward.

JURISDICTION

2. This court has jurisdiction over this action pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(1) (West 2006), as well as 28 U.S.C. § 1331 (West 2006) (federal question), 28 U.S.C. § 1346 (West 2006) (United States as a defendant), and 28 U.S.C. § 1361 (West 2006) (mandamus).

3. The relief requested is specifically authorized pursuant to the APA, 5 U.S.C. § 706(1) (West 2006), 28 U.S.C. § 1651 (West 2006) (writs), 28 U.S.C. §§ 2201-02 (West 2006) (declaratory judgment and further relief), 28 U.S.C. § 2412 (West 2006) (costs and fees).

VENUE AND INTRADISTRICT ASSIGNMENT

4. Pursuant to Civil Local Rule 3-2(c), plaintiff states that it bases venue in this district and assignment to the San Francisco Division on the following: 1) plaintiff Sierra Club is incorporated in California and resides and maintains its headquarters in San Francisco County in this judicial district; 2) this action seeks relief against federal officials acting in their official

1 capacities; and 3) 28 U.S.C. §§ 1361 and 1391(e) (West 2006) provide for venue in the judicial
2 district of a plaintiff's residence, including the San Francisco Division.

3 **PARTIES**

4 5. Plaintiff Sierra Club was founded in 1892 and is the nation's oldest grassroots
5 environmental organization. The Sierra Club is incorporated in California, and has its
6 headquarters in San Francisco, California. It has more than 750,000 members nationwide,
7 including over 191,000 members in California.

8 6. Sierra Club is dedicated to the protection and preservation of the natural and
9 human environment. One of the Sierra Club's national initiatives is finding solutions to the
10 pressing problems of global warming, air pollution, and our national dependence on dirty, non-
11 renewable energy sources such as nuclear power, oil and coal. A central part of this initiative is
12 to promote the use of clean energy sources. Impediments to wind energy development
13 undermine the Club's campaign to promote renewable energy sources. In addition, our nation
14 becomes more dependent on oil, coal and nuclear power when wind energy developments are
15 impeded; which in turn exacerbate global warming and air pollution problems.

16 17 7. Gas and electric companies throughout the nation allow their customers to
18 purchase electricity generated specifically from wind energy. Unfortunately, the demand for
19 wind energy is higher than the supply of wind energy, and many customers, including Sierra
20 Club members, cannot purchase their electricity from wind power. For instance, Madison Gas &
21 Electric allows its customers to purchase their electricity from wind energy. However, the
22 demand for wind energy exceeds the supply and many Wisconsin residents, including many
23 Sierra Club members, are on a waiting list with Madison Gas & Electric to purchase their
24 electricity from wind power.
25

8. These gas and electric companies, including Madison Gas & Electric, cannot build new windmill farms nor purchase wind energy from other new windmill farms to meet the wind energy demand because, as discussed in detail below, Defendants' actions have created a de facto moratorium on new wind power projects. Therefore, Defendants' actions are preventing Sierra Club members from purchasing clean, wind-generated power.

9. Sierra Club has members in California, and across the nation, whose health, aesthetic and/or environmental interests have been, are being, and will continue to be adversely affected by the destructive impacts associated with nuclear power, coal and oil, our nation's increased reliance on such energy sources, and the inadequate supply of wind energy sources. Therefore, Club members' health, aesthetic, economic and/or environmental interests have been, are being, and will be adversely affected by Defendants' actions as set forth herein, which are impeding the development of wind energy nationwide. Sierra Club brings this action on behalf of itself and its members.

10. Defendant Donald Rumsfeld is the Secretary of the United States Department of Defense, and is named solely in his official capacity.

11. Defendant United States Department of Defense is a Department of the Executive Branch of the United States Government. The Department of Defense is an “agency” within the meaning of the APA, 5 U.S.C. § 701(b) (West 2006).

FACTS

12. On January 6, 2006, Congress enacted the Department of Defense Authorization Act for Fiscal Year 2006. Section 358 of the Authorization Act requires that “[n]ot later than 120 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House

1 of Representatives a report on the effects of windmill farms on military readiness, including an
2 assessment of the effects on the operations of military radar installations of the proximity of
3 windmill farms to such installations and of technologies that could mitigate any adverse effects
4 on military operations identified.” (emphasis added)

5 13. May 8, 2006 was the first business day that was 120 days after the enactment of
6 the Authorization Act.

7 14. The May 8, 2006 deadline has passed and Secretary Rumsfeld has failed to submit
8 to the Committees on Armed Services of the Senate and the House of Representatives the
9 required Wind Report.

10 15. On March 21, 2006, DOD and the United States Department of Homeland
11 Security issued an “Interim Policy on Proposed Windmill Farm Locations,” (the “Interim
12 Policy”) which states that the “DOD/DHS [Department of Homeland Security] Long Range
13 Radar Joint Program Office Interim Policy is to contest any establishment of windmill farms
14 within radar line of site [sic] of the National Air Defense and Homeland Security Radars. This
15 [Interim Policy on Proposed Windmill Farm Locations] is to remain in effect until the
16 completion of the study and publishing of the Congressional Report.”

17 16. In order to operate and construct a windmill farm, an energy developer must
18 obtain a notice from the Federal Aviation Authority (FAA) stating that the installation is not a
19 hazard to air navigation.

20 17. The FAA is interpreting the “Interim Policy” to mean that it cannot issue such a
21 notice to a proposed windmill farm that is within radar line of sight of any National Air Defense
22 and Homeland Security Radar. Instead, the FAA has been issuing “Notices of Presumed
23 Hazard,” which contain statements such as the following (emphasis added):
24
25

1 At the discretion [sic] of Congress, the Secretary of Defense is tasked to submit a
 2 report on the effects of windmill farms on military readiness. This report is to
 3 include an assessment of the effects of windmills on the operations of military
 4 radar installations, proximity of windmill farms to such installations and of the
 5 technologies that could mitigate any adverse effects on military operations.

6 The Department of Defense and the Department of Homeland Security Long
 7 Range Radar Joint Program Office Interim Policy is to contest any establishment
 8 of windmill farms within radar line of site of the National Air Defense and
 9 Homeland Security Radars. This is to remain in effect until the completion of the
 10 study and publishing of the Congressional Report.

11 This study should be completed by summer 2006. Therefore, the Federal
 12 Aviation Administration concurs with the development of wind turbines within
 13 the radar line-of-sight and recommends that the subject proposal be delayed until
 14 the comprehensive analysis is completed.

15 18. Since much of the nation is “within radar line of sight,” the Interim Policy and the
 16 FAA’s implementation of that policy have created a de facto moratorium on new wind power
 17 projects in our nation, and this will continue until Defendants complete and publish the Wind
 18 Report.

19 COUNT 1

20 19. The Administrative Procedure Act, 5 U.S.C. § 702 (West 2006), provides that “[a]
 21 person suffering legal wrong because of agency action, or adversely affected or aggrieved by
 22 agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”
 23 The APA defines “agency action” to include an agency’s “failure to act,” 5 U.S.C. §§ 701(2),
 24 551(13) (West 2006).

25 20. The APA, 5 U.S.C. § 706(1) (West 2006), further provides that a reviewing court
 shall “compel agency action unlawfully withheld or unreasonably delayed.”

21. By failing to issue the Wind Report as required under Section 358 of the Department of Defense Authorization Act for Fiscal Year 2006, Defendants have violated the APA by unlawfully withholding and/or unreasonably delaying performance of a statutory duty owed to the Plaintiff and thousands of individuals who have an interest in developing wind energy in this nation.

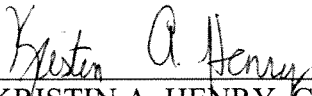
PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter an order:

- (a) Declaring that Defendants' have unreasonably delayed and unlawfully withheld issuing the Wind Report in violation of the Administrative Procedure Act;
- (b) Ordering Defendants to issue the Wind Report within 45 days of the entry of this Order;
- (c) Retaining jurisdiction of this action to ensure compliance with its decree;
- (d) Awarding Plaintiff's their attorney's fees and all other reasonable expenses occurred in pursuit of this action; and
- (e) Granting other such relief as the Court deems just and proper.

Dated: June 28, 2006

Respectfully submitted,


 KRISTIN A. HENRY, CA Bar No. 220908
 SIERRA CLUB
 85 Second Street, 2nd Floor
 San Francisco, CA 94105-3459
 Tel: (415) 977-5716
 Fax: (415) 977-5793
 kristin.henry@sierraclub.org

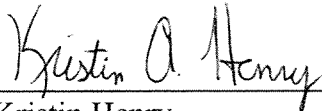
1 DAVID BOOKBINDER, D.C. Bar No. 455525
2 SIERRA CLUB
3 408 C Street, NE
4 Washington, DC 20002-5818
5 Tel: (202) 548-4598
6 Fax: (202) 547-6009
7 david.bookbinder@sierraclub.org

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Attorneys for Plaintiff Sierra Club

CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

Dated: June 28, 2006



Kristin Henry
Sierra Club
Attorney of Record